



Contingency Contracting Training



**Protests,
Claims,
Disputes,
and Appeals**



[Chapter 7 in DCC Handb](#)



Overview

- Key Points
- Protests
- Contract Claims
- Seizures
- Contract Disputes and Appeals
- Contract Settlements and Alternative Dispute Resolution
- Chapter Acronyms





Key Points

- Upon receipt of a protest, the contingency contracting officer (CCO) needs to act quickly and contact supporting legal counsel
- To avoid distracting, time-consuming litigation, strive to resolve contract performance issues by mutual agreement with the contractor
 - Interests of the government can often be best protected when vendor concerns are resolved quickly and at the lowest level





Protests

Protests ([FAR 33](#)) – a written objection by an interested party to:

- A solicitation or other request by an agency for offers of a contract for the procurement of property or services
- Cancellation of the solicitation or other request
- Award or proposed award of the contract
- Termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract
- Delivery and task orders under multiple award contracts in excess of \$10.0M





Protests

- [Executive Order 12979](#), *Agency Procurement Protests*, establishes policy on agency procurement protests
- Acceptable protest resolution methods:
 - Alternative dispute resolution techniques
 - Third party neutrals
 - Agency's personnel
- Protests must include, [FAR 33.103\(d\)\(2\)](#):
 - Detailed statement of legal and factual grounds for the protest, to include a description of resulting prejudice to the protester
 - Request for a ruling by agency
 - Failure to substantially comply with the above may be grounds for dismissal of the protest





Protests

- Notify potential bidders if independent reviewer available
- Any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action
 - Express option ([4 CFR 21.2\(a\)\(3\)](#)), the party must submit a written request no later than 5 days after the initial or supplemental amended protest is filed ([4 CFR 21.10\(a\)](#))

Action Upon Receipt of Protest:

- Contract may not be awarded until the protest is resolved
- CO shall immediately suspend performance, pending outcome
- Protests should be resolved within 35 days after protest filing





Protests

Protests at the GAO:

- Receipt of a Protest, [4 CFR 21](#) - Upon receipt of a protest, the CCO should immediately contact supporting legal counsel
 - Government report due to the GAO within 30 days (within 20 days under the express option)
 - GAO decision issued within 100 days (within 65 days under the express option)
- Reachback - highly effective tool during a protest, can rapidly understand issues
 - Many local legal counsels work with a reachback legal office





Protests

Urgent and compelling circumstances that significantly affect the interest of the US will not permit awaiting the decision of the GAO

1. Protests Before Award, [FAR 33.104\(b\)](#):

- Contract may not be awarded unless authorized by HCA
- Likely to occur within 30 days of the written finding

2. Protest After Award, [FAR 33.104\(c\)\(1\)](#):

- CO must immediately suspend/terminate the awarded contract:
- Agency receives GAO protest notice within 10 days after award
- Within 5 days after a debriefing required by [FAR 15.505](#) or [FAR 15.506](#)
- HCA may, on a nondelegable basis, authorize contract performance if within the best interests of the US





Protests

- Responding to a Protest ... The first 24 hours
 - Upon receipt, immediately contact/forward a copy of the protest document to legal counsel
 - Discuss allegations with assigned attorney and potential impact to the mission if delay of award is triggered
- Responding to a Protest ... The first 30 days
 - Timely assessment of the protest allegations is key
 - Government must submit its agency report due to the GAO and the protester(s) within 30 days
 - Given the concentrated timeline, maintain daily communication with the attorney regarding the status of the protest





Protests

Corrective Action:

- Government must take corrective action within the first 30 days (20 days under the express option)
 - Government must file its agency report with the GAO
 - Avoid paying significant legal expenses
 - Get the acquisition back on track toward award
- After Day 30 (Day 20 under the express option)
 - Protester has 10 days to file a written response to the government's agency report
 - GAO will issue its decision by day 100 (day 65 under the express option)
 - GAO may request a hearing and requires testimony by government officials





Contract Claims

- Contingency contracting produces an environment ripe for contractor claims – there's little to prevent it
 - Not every contractor request for relief is a “claim”
 - Strive to resolve issues by mutual agreement
 - Contact legal counsel frequently for assistance and advice
 - Responding to contractor's claim can be time consuming
- CCO Final Decision, [FAR 33.211](#)
 - Utilize specialized skills of the functional representatives
 - Must be issued within 60 days after receipt
 - May still result in a dispute by the contractor





Contract Disputes and Appeals

- Contract disputes and appeals handled the same way, whether in a contingency contracting environment or at home base
- CCOs receive no special treatment or waiver because of a contingency contract action; [41 U.S.C. 7101-7109](#), [FAR 33.202](#)
- Legal counsel must be involved early - effective in assessing and orchestrating government response to a contractor's appeal
- Underlying record of evidence is critical to crafting response
- Contractors should send appeals to the following address:



Civilian Board of Contract Appeals

1800 F Street, NW

Washington, DC 20405



Contract Disputes and Appeals

- Contract disputes involve issues developing over time
- In a contingency environment the challenge to assemble a solid contract record presents unique hurdles
- Simple practices to mitigate these challenges:
 - Digital and Video Camera - A picture is worth a thousand words
 - Personnel Turnover - Work with J-1 to ensure key witnesses, past and present, can be easily located
 - Contract Files and Related Documentation – Availability of sound contract documentation is vital, without it a case is seriously weakened
 - Considering developing electronic files and charts
 - Use your reach-back legal counsel to assemble the underlying record, [28a USC Rule 4](#), for contract appeals





Contract Settlements and Alternative Disputes Resolution

- If a dispute cannot be resolved, the CCO may consider negotiating a settlement or using a more formal ADR procedure with the contractor, [FAR 33.214](#)
 - In either event, the CCO should seek the assistance and support of legal counsel
- Timely agreements by both parties are more valuable to maintain a continuing business relationship with the contractor during a contingency





Contract Settlements and Alternative Disputes Resolution

- Essential elements of ADR include:
 - Existence of an issue in controversy
 - Both parties voluntarily participation in the ADR process
 - An agreement on alternative procedures and terms
 - Both parties have the desire and authority to settle
- If ADR is used, a few tips to consider:
 - Know your facts and stay focused on the objective
 - Be professional and observe local customs at all times
 - Develop an appreciation for the other side's view
 - Diffuse anger at first sight
 - Use simple, clear, and concise language
 - If using a mediator or facilitator, talk to the other side, not the mediator





Seizures

Property Control Record Book (PCRB): documents the seizure of private or public property during hostilities

- Each PCRB should be numbered and contain a minimum of ten sets of four serial numbered copies of the property control record form
- Inside cover should contain instructions to the commander on the use of the forms
- The serial numbered property control record must include pertinent information concerning the seized property and should contain a receipt, both in English and the local language, to be signed by the property owner, if available
- The staff judge advocate (SJA) office should be responsible for the issuance of the books to the commanders
- Accountability for the books and seized property is a command responsibility





Seizures

Payment for Seizures:

- Ratification, the act of approving an unauthorized commitment by an official who has the authority to do so
- Retroactive leases, the Corps of Engineers may negotiate retroactive leases in accordance with IAW [Army Regulation 405-15](#)
- Defense agencies may enter into and modify contracts, whenever the secretary concerned considers that such action would facilitate the national defense, [50 USC §1431-1435](#) and [Executive Order 10789](#), as [amended](#) for the Department of Homeland Security
- Local conditions will influence this process
- Contracting responsibility is generally limited to ratification actions and extraordinary contractual relief under [50 USC §1431-1435](#) and [AR Part 50](#)





Chapter Acronyms

- ADR – Alternative Dispute Resolution
- AOR – Area of Responsibility
- CCO – Contingency Contracting Officer
- CFR – Code of Federal Regulations
- COR – Contracting Officer's Representative
- FAR – Federal Acquisition Regulation
- GAO – Government Accountability Office
- HCA – Head of Contracting Activity
- IAW – In Accordance With
- PCRB – Property Control Record Book
- SJA – Staff Judge Advocate
- US – United States
- USC – United States Code





**Agile Contracting Support...Anytime...
Anywhere**

